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## **BREAKING THE BANK: REVISITING CENTRAL BANK OF DENVER AFTER ENRON AND SARBANES-OXLEY**

In this era of heightened awareness of corporate wrongdoing, the role of “gatekeepers”—those charged with policing and preventing bad behavior is coming under intense scrutiny. Precisely what role gatekeepers should play, and what liability they should face if they fail to perform their role adequately, is the subject of great debate. Consequently, actors usually thought of as gatekeepers—including auditors, accountants and lawyers, among others, face a confusing array of legal precedents and largely untested legal regimes as they try to conform their conduct to the law. The uncertainty they face is harmful for the gatekeepers, for those who attempt to hold them accountable and for our legal system as a whole, as it undermines the clarity and certainty of law that is the goal we strive for.

This Article addresses one small aspect of gatekeeper liability, arguing that it is time to re-instate aiding and abetting liability for such “secondary actors” in suits brought by private parties under § 10(b) and Rule 10(b)5 of the Securities Exchange Act of 1934 (the “‘34 Act”)<sup>1</sup>. Although the Securities Exchange Commission (the “SEC”) currently has the authority to pursue such claims, the Supreme Court in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* (“*Central Bank*”)<sup>2</sup> precluded private parties from doing so. Aiding and abetting liability is an important weapon in the fight to deter corporate fraud. Given that the Supreme Court is unlikely to reverse its course on the issue, Congress must act. It could easily do so by adding a provision to the Public Company Accounting and Investor Protection Act of 2002, commonly known as the Sarbanes-Oxley Act (“Sarbanes-Oxley”, or “SOX”)<sup>3</sup> expressly authorizing a private right of action for aiding and abetting liability under § 10(b) and Rule 10(b)5.

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<sup>1</sup>15 U.S.C. § 78a-11 (2000).

<sup>2</sup>511 U.S. 164 (1994).

<sup>3</sup>Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

Empowering private parties to pursue aiding and abetting claims will provide a needed avenue of recourse to investors who suffer serious harm when gatekeepers fail to deter fraud. It will enhance the deterrence of improper behavior in the securities industry and will increase investor confidence in the capital markets.

This Article makes the case for re-instating the ability of private parties to bring aiding and abetting liability claims against gatekeepers by demonstrating that judicial and Congressional will supports such an effort. It first defines “gatekeepers” and explains their role in the securities arena. It then discusses the decision in *Central Bank* and explains the turmoil that decision caused for courts seeking to hold gatekeepers liable. It then looks at the decision handed down by the court considering the liability of various actors for the implosion of Enron, and argues that the decision shows strong judicial commitment to expanding gatekeeper liability. The Article next examines Sarbanes-Oxley and its impact on gatekeeper liability, arguing that passage of that Act demonstrates clearly Congressional commitment to holding secondary actors to account. Finally, it proposes a method of re-instating aiding and abetting liability and weighs the arguments for and against taking such a step, concluding that it would be beneficial to all if aiding and abetting liability is re-instated for private party claims.

### **Defining “Gatekeeper”**

“Gatekeeper” generically defined is a third party, who by virtue of his position, has the ability to prevent another person from engaging in illegal or inappropriate behavior. In the corporate context, gatekeepers include participants who facilitate transactions although they are not the main participants in them. Auditors, accountants, banks and lawyers are corporate gatekeepers.<sup>4</sup> Gatekeepers, also referred to as secondary actors, have the ability to monitor corporate conduct and help to prevent fraud by refusing to provide their necessary assistance if they find evidence of wrong doing by the primary participants in a transaction. For example, an auditor who discovers an anomaly in an issuer’s financial statements can refuse to issue a necessary opinion letter. Conversely, gatekeepers may help perpetuate a fraud by allowing a transaction to continue despite evidence of wrong doing by the primary actors. Consider, for example, a lawyer who during the course of due diligence discovers financial impropriety in an issuer’s books, but says nothing and allows public documents containing the misrepresentations to be filed. While the attorney may not have participated directly in working a fraud on investors, she has allowed fraud to occur when it may have been in

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<sup>4</sup>For useful descriptions of gatekeepers and their functions see Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 Yale L.J. 239 (1984); Reiner H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L.Econ. & Org. 53 (1986).

her power to prevent it, assuming that responsible parties at the issuer would have responded appropriately if she alerted them to the impropriety. Thus, she has failed in her gatekeeper function.

It is precisely this kind of gatekeeper failure that is generating extensive discussion. Corporate gatekeeper behavior is at the center of the storm over how best to monitor corporate behavior because of the abject failure of such actors in recent years to perform the job expected of them. Despite the presence of gatekeepers at virtually every step of the way, rampant corporate fraud *did* happen at companies such as Enron and WorldCom, to name just a few of the more dramatic examples. Clearly, the parties the securities industry traditionally relied on to help monitor the field proved woefully inadequate for the job. This drastic gatekeeper failure naturally leads to questions about why it occurred, and what might be done to prevent similar failure in the future.<sup>5</sup> While the explanations for gatekeeper failure and suggestions for its reform vary, there is common recognition that the role of gatekeepers is essential to the functioning of US capital markets. Therefore, rather than eliminate their role, most considering the issue advocate enhancing their power and responsibility. The need for enhancing gatekeeper power and accountability is coming not only from legal academicians but from courts and Congress. Decisions such as that issued by the court considering the implosion at Enron show judicial concern with the role of gatekeepers and reflect a commitment on the part of courts to hold secondary actors liable for failure to perform their functions adequately. The need for stronger gatekeepers is also on the minds of Congress, as demonstrated with the enactment of Sarbanes-Oxley, which explicitly made gatekeeper functions a primary focus of reform.<sup>6</sup>

As important as recent decisions and SOX are in establishing more clearly defined gatekeeper responsibilities, they do not answer a serious issue that has long plagued the corporate bar. Specifically, they do not clarify the appropriate threshold of liability for gatekeepers who fail to perform their proscribed roles properly. The issue of gatekeeper liability has been controversial since the United States Supreme Court decided *Central Bank of Denver v. First Interstate Bank*<sup>7</sup> in 1994, and in a surprising move, eliminated the

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<sup>5</sup>See e.g., John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U.L.Rev. 301 (2004); Peter B. Oh, *Gatekeeping*, 29 Iowa J.Corp. L. 735 (2004).

<sup>6</sup>For discussion of specific provisions of SOX focusing on gatekeeper liability see *infra*. See also generally, Jill E. Fisch & Caroline M. Gentile, *The Qualified Legal Compliance Committee: Using the Attorney Conduct Rules to Restructure the Board of Directors*, 53 Duke L.J. 517 (2003).

<sup>7</sup>114 S.Ct. 1439 (1994)(hereinafter “*Central Bank*”).

ability of private parties to bring aiding and abetting claims under § 10(b) and Rule 10(b)5. As discussed below, *Central Bank* largely insulated gatekeepers from liability for fraud, but did not protect them entirely. Instead, the decision caused great confusion and uncertainty as to when and how gatekeepers might be held liable when fraud occurred.

### **The *Central Bank* Decision**

From the time § 10(b) and Rule 10(b)5 came into being in the 1930s until the mid-1990s, federal courts uniformly recognized a private cause of action for aiding and abetting liability under § 10(b), the general anti-fraud provision of the Securities Exchange Act of 1934.<sup>8</sup> Although the statute itself does not explicitly mention aiding and abetting liability, courts quickly adopted the position that to further the basic philosophy of the '34 Act seeking to create and maintain a securities market free from fraud, liability under § 10 (b) could be imposed on those who do no more than aid and abet violations of that section.<sup>9</sup>

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<sup>8</sup>Section 10(b) states that it

“shall be unlawful for any person, directly or indirectly, by the use any means of instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange....any manipulative or deceptive device or contrivance contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”

Under Section 10(b), Rule 10(b)(5) states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,  
in connection with the purchase or sale of any security.

<sup>9</sup>*See, e.g., Brennan v. Midwestern United Life Ins. Co.* 259 F. Supp. 673, 680 (ND. Ind. 1966, *aff'd*, 417 F.2d 147 (7<sup>th</sup> Cir. 1969).

Decided in 1994, *Central Bank* changed the playing field dramatically and marked the end of straight-forward aiding and abetting liability under section 10(b) and Rule 10(b)(5). *Central Bank* involved claims arising out of bond offerings made in 1986 and 1988 by Colorado Springs-Stetson Hill Public Building Authority (“Authority”) for which Central Bank of Denver served as the indenture trustee. The bond covenants required that the bonds be secured by real estate having an appraised value of at least 160% of the outstanding principal and interest. The first offering was made without incident. However, although at the time of the offerings the real estate market in Colorado was suffering a serious decline, the appraisal of the collateral for the second offering did not reflect any change, but indicated that the value had remained essentially the same. When the lead underwriter questioned the accuracy of the appraisal, Central Bank decided that an independent appraisal was necessary, but delayed that action until after the completion of the second bond offering in 1988. Thereafter, and before any independent review was done, the Authority defaulted on its bonds. First Interstate, who had purchased over \$2 million of bonds as part of the second issue, sued. As part of its claim, First Interstate alleged that Central Bank of Denver had aided and abetted Authority’s fraudulent scheme by failing to obtain an accurate appraisal of the collateral.

In the initial phases of the proceedings (and in keeping with the then prevailing understanding of liability under § 10(b)), the parties and the court accepted that aiding and abetting liability existed under § 10(b), but differed over whether Central Bank was culpable. Of its own initiative, the Supreme Court raised the question of whether aiding and abetting liability was appropriate at all under that section.<sup>10</sup> In a 5-4 majority opinion that surprised most commentators<sup>11</sup>, the Court strictly interpreted the text of the ‘34 Act and held that no private right of action for aiding and abetting existed under the section in question. The Court noted that the words “aid” and “abet” do not appear in the statute, and rejected the SEC’s argument that the phrase “directly or indirectly” in § 10(b) shows Congressional intent to reach aiding and abetting. The Court reasoned that permitting aiding and abetting liability to reach secondary actors on the theory that such actors are indirectly engaging in the fraud of the primary actors would reach “persons

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<sup>10</sup>The Court had expressed declined to address this issue in many years earlier in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, n.7 (1976).

<sup>11</sup> See e.g., David J. Baum, *The Aftermath of Central Bank of Denver: Private Aiding and Abetting Liability Under Section 10 (b) and Rule 10 (b)5*, 44 Am. U.L. Rev. 1817 (1995); Note, *An Analysis of Aider and Abettor Liability Under Section 10(b) of the Securities Exchange Act of 1934: Central Bank of Denver v. First Interstate Bank of Denver*, 27 Conn. L. Rev. 1323 (1995); James D. Redwood, *Toward a More Enlightened Securities Jurisprudence in the Supreme Court? Don’t Bank on it Anytime Soon*, 32 Hous. L. Rev. 3 (1995).

who do not engage in the proscribed activities at all, but who give a degree of aid to those who do.”<sup>12</sup> For the Court, such an extension of liability was not statutorily justified. Reasoning that “Congress knew how to impose aiding and abetting liability when it chose to do so” the Court concluded that “the text of the 1934 Act does not itself reach those who aid and abet a § 10 (b) violation.”<sup>13</sup>

While this holding clearly shut down the right to pursue a gatekeeper on an aiding and abetting claim under § 10(b) and Rule 10(b)(5),<sup>14</sup> the Court did not protect from corporate gatekeepers from *all* liability. Instead, in a statement that would lead to great interpretive confusion, the Court found that the “absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities acts. Any person or entity, including a lawyer, accountant or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met.”<sup>15</sup>

Essentially then, after *Central Bank*, corporate gatekeepers can not be found liable for aiding and abetting, but can be found liable if their conduct is sufficiently pro-active that they can be characterized as a primary violator. With respect to private party actions, this remains the state of the law today.<sup>16</sup>

### **The Aftermath of *Central Bank***

The decision in *Central Bank* forced lower courts to confront the sticky issue of who would be considered a primary violator, and therefore potentially liable under § 10(b), and who would be merely a secondary actor not subject to liability although involved in the fraud to some degree. Over time, two tests developed to answer this question, each leading to very different results.

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<sup>12</sup>511 U.S. 164, 179.

<sup>13</sup>*Id.*

<sup>14</sup>Originally, all parties were barred by *Central Bank* from pursuing aiding and abetting claims. However, as part of the Private Securities Litigation Reform Act of 1995, the SEC was given the power to do so through an amendment to the Securities Exchange Act of 1934. *See*, Securities Exchange Act of 1934 § 20(e), 15 U.S.C. § 78(e).

<sup>15</sup>*Id.* at 191.

<sup>16</sup>The SEC was granted authority to pursue aiding and abetting claims under § 10(b) and Rule 10(b)5 by the Public Securities Litigation Reform Act.

## The Bright Line Test

Used by a majority of jurisdictions, the bright line test is the more restrictive of the tests imposing liability on gatekeepers. The test requires that to be considered a primary violator (and therefore subject to potential liability) an actor must “make” a false or misleading statement, and that the misstatement must be attributed to the gatekeeper at the time it is disseminated to the public.<sup>17</sup> For jurisdictions adopting the bright line test, strict adherence to these requirements is essential to comply with *Central Bank*. Requiring that the defendant “make” the statement addresses the concern voiced in *Central Bank* that a liable party actually “engage” in proscribed conduct. As the Second Circuit (the lead jurisdiction in the development of the test) made clear:

If *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b).<sup>18</sup>

The need to link the misstatement directly to the gatekeeper is necessary to satisfy *Central Bank*’s demand that *all* elements of primary liability be satisfied before a gatekeeper can be found liable. Public attribution enables a plaintiff to claim reliance on the particular misstatement at issue—and of course, reliance is an element of a § 10 (b) claim. Therefore, under the bright line test it is not enough that a misstatement is made. Instead, the false or misleading statement “must be attributed to that specific actor at the time of public dissemination, that is, in advance of the investment decision.”<sup>19</sup>

The significance of the bright line test is its limiting effect on potential gatekeeper liability. Under the test, primary actor status (and its associated liability) does not extend

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<sup>17</sup>See, e.g., *Ziemba v. Cascade Int’l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *Shapiro v. Cantor*, 123 F.3d 717 (2d Cir. 1997).

<sup>18</sup>*Shapiro* at 720.(quoting *In re MTC Elec. Techs S’holders Litig.*, 898 F. Supp. 974, 987 (E.D.N.Y. 1995).

<sup>19</sup>*Winkler v. Wigley*, No 00-7624, 2000 U.S. App. LEXIS 31332, at \*8 (2d Cir. Dec 6, 2000). See also, *Wright v. Ernst & Young, LLP*, 152 F.3d 169 (2d Cir. 1998), cert. Denied, 525 U.S. 1104 (1999)(“misrepresentation must be attributed to that specific actor at the time of public dissemination”).

to participants in a securities transaction who do not sign documents, release materials under their own name or in some other way affirmatively announce their involvement with the transaction. As long as actors remain behind the scenes, they cannot be characterized as primary actors and will not incur liability.

### **The Substantial Participation Test**

The substantial participation test is not as kind to gatekeepers as the bright line test. This test, developed in large part by the Ninth Circuit, reads *Central Bank* more expansively and characterizes an actor as a primary violator if that actor participates in the fraud in a “substantial” manner.<sup>20</sup> The critical difference between the substantial participation test and the bright line test is that under the substantial participation test there is no requirement that the gatekeeper be named nor that any false statement be attributed to her directly. Thus, the substantial participation test allows primary liability to attach to secondary actors who participate in the drafting of documents containing false or misleading statements, even if those actors affirmatively make a statement in the documents, and even though there is no misstatement publically attributed to them. Under the substantial participation test, liability as a primary violator for such gatekeepers is appropriate because they are “intricately involved” in the fraud,<sup>21</sup> and therefore can be considered to have themselves engaged proscribed behavior.

For many years, the substantial participation test found little favor outside of the 9<sup>th</sup> Circuit. Recently, however, it gained prominence in a decision involving Enron issued by Judge Melinda Harmon.<sup>22</sup> That decision not only approved, but arguably extended the reach of, the substantial participation test, leading one commentator to note that “[u]nder the Enron ruling, most who could formerly be reached under “aiding and abetting” liability now seemingly can be reached as a “maker” or “creator” of a public statement.”<sup>23</sup>

### **Enron and “Substantial Participation”**

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<sup>20</sup>See, e.g., *Dannenberg v. PaineWeber Inc. (In re Software Toolworks Ind. Sec. Litig.)*, 50 F.3d 615, 628 n.3 (9<sup>th</sup> Cir. 1994), *In re ZZZZ Best Sec. Litig.* 864 F. Supp. 960, 971 (C.D. Cal. 1994).

<sup>21</sup>*Id.*

<sup>22</sup>*In re Enron Corp. Sec, Derivative & ERISA Litig.*, 235 F. Supp. 2d 549 (S.D. Tex. 2002).

<sup>23</sup>John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U.L.Rev. 301, 338 (2004).



The implosion of Enron, which caused billions of dollars of shareholder equity to vanish into thin air, not surprisingly occasioned multiple public and private lawsuits. Several of the private actions were consolidated into one major class action, filed in the United States District Court for the Southern District of Texas. Defendants in the class action included many secondary actors—banks, accountants and lawyers to name a few. The issue of primary liability for secondary actors was thus called squarely into question.

In her opinion, Judge Harmon, after an exhaustive review of *Central Bank* and its progeny, adopted an expansive version of the substantial participation test, finding that "when a person, acting alone or with others, creates a misrepresentation [on which the investor-plaintiffs relied], the person can be liable as a primary violator . . . if . . . he acts with the requisite scienter."<sup>24</sup> The court adopted this test for primary liability directly from an amicus brief submitted by the SEC, concluding that approach and rationale of the SEC with regard to primary liability under §10(b) was "well reasoned and reasonable, balanced in its concern for protection for victimized investors as well as for meritlessly harassed defendants...in addition to the policies underlying the statutory private right of action for defrauded investors....and...consistent with the language of § 10(b), Rule 10b-5 and *Central Bank*."<sup>25</sup>

Because the Enron decision adopted wholesale the SEC position on secondary actor liability, it is important to examine that position carefully. In its brief (which was initially prepared in connection with a different case), the SEC strongly criticized the bright line test for gatekeeper liability. For the SEC, the relevant issue is whether

a person who makes a material misrepresentation, while acting with the requisite scienter, but who does not himself disseminate the misrepresentation to investors, and whose name is not made known to them, only an aider and abettor of the fraud, or is that person a primary violator subject to liability [under § 10(b)]<sup>26</sup>

and the answer was clear. A critical component of the SEC argument was equating the word "make" as used in Rule 10 (b)5 with the word "creates." By equating "makes" with "creates" the SEC was able to argue that anyone involved in the "creation" of a misstatement could be found liable for making that misstatement. Accepting the terms as synonymous justifies extending primary violator liability to violators who are involved with a fraud, but who neither make an affirmative misstatement of their own, nor have any misstatement publically attributed to them.

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<sup>24</sup> *Enron* at 588.

<sup>25</sup> *Id* at 590.

<sup>26</sup> *Id.* at 586.

The SEC justified its position by noting that the Supreme Court in *Central Bank* did not set forth a bright line test for liability and that extending liability to one who “creates” the misrepresentation is in keeping with the overall statutory language of § 10(b). Specifically, the SEC pointed to the language of the section prohibiting an actor from indirectly using or employing a deceptive device or contrivance. In other words, for the SEC (and therefore for the *Enron* court), any actor who participates in the creation of a misleading document is doing precisely what the statute forbids and therefore can be held liable as a primary violator. Under this approach, the creation of the misstatement is enough. No attribution of the misstatement to the gatekeeper is or should be required because requiring attribution would “have the unfortunate and unwarranted consequence of providing a safe harbor from liability for everyone except those identified with the misrepresentation by name.”<sup>27</sup>

Further, under the SEC position as adopted by *Enron*, not only is attribution of the misstatement to the gatekeeper not required, but the gatekeeper need not be the originator of the misstatement. Indeed, “it would not be necessary for a person to be the initiator of a misrepresentation in order to be a primary violator. Provided that a plaintiff can plead and prove scienter, a person can be a primary violator if he or she writes misrepresentations for inclusion in a document to be given to investors, even if the idea for those misrepresentations came from someone else.”<sup>28</sup> The key to the SEC argument is premising liability on the creation of the misrepresentation. Rather than testing the level of participation in the overall fraud, this test simply looks at whether the gatekeeper was responsible for the generation of a specific falsehood. Without a hand in the creation, no liability would extend. The SEC was careful to point out that “a person who prepares a truthful and complete portion of a document would not be liable as a primary violator for misrepresentations in other portions of the document. Even assuming such a person knew of misrepresentations elsewhere in the document and thus had the requisite scienter, he or she would not have created those misrepresentations.”<sup>29</sup>

The SEC argued that extending liability to those gatekeepers who “create” a misrepresentation better suits the statutory objectives of § 10(b) while not penalizing innocent parties. The chances of frivolous claims being brought are substantially minimized by the requirement that the pleading party prove scienter and reliance.

In accepting the SEC position in its entirety, the *Enron* court clearly rejected the bright line test for gatekeeper liability. It suggested that it also rejected the “substantial

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<sup>27</sup>Id. at 587.

<sup>28</sup>Id at 693.

<sup>29</sup>Id at

participation” test, calling it “too expansive.”<sup>30</sup> For the court, its opinion fit squarely within the dictates of *Central Bank* because the test it adopts premises liability on the creation of a misstatement. This direct involvement in the fraud is more than simple “participation.” It requires affirmative acts that cause the misstatement to come into being. For the *Enron* court “[t]he requirement that the secondary party, itself, allegedly make a false or misleading representation (or omission) or commit a deceptive act that violates § 10(b) brings the party within the primary liability definition of the statute and avoids aiding and abetting pitfalls....”<sup>31</sup>

Many have criticized the *Enron* decision, arguing that it takes “a detour around *Central Bank*.”<sup>32</sup> The main objection raised by critics is that the test adopted by the *Enron* court covertly re-instates aiding and abetting liability by equating “create” with “make.”<sup>33</sup> They point out that *Central Bank* explicitly extended liability only to those who “make” a misstatement and argue that because § 10 (b) covers only those who “use” or “employ” a manipulative device or contrivance, “make” must mean more than create—it must include some affirmative action on the part of the secondary actor to transmit the misstatement to the public. Premising liability on the mere “creation” of a misstatement penalizes those who do no more than participate in the creation of a fraud, and contradicts *Central Bank*’s prohibition of imposing liability on “persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do.”

Further, critics say that the test adopted in *Enron* subverts the reliance element of a § 10 (b) claim (although the opinion insists that plaintiffs will have to show all elements to prevail). They reason that premising liability on the mere creation of a misstatement without attribution of it to an identified secondary actor means that a plaintiff can not claim to have relied on any particular statement. In response, supporters of the *Enron* test note that theories such as fraud-on-the-market do not require individual allegations of reliance, but allow plaintiffs to rely on the overall “integrity” of market prices.

The “correctness” of the *Enron* decision, while interesting and important, is not the focus of this Article. It is evident from the careful linguistic gymnastics of Judge Harmon’s opinion that great effort went into finding an avenue to hold secondary actors

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<sup>30</sup>Id at 588, n. 26.

<sup>31</sup>Id.

<sup>32</sup>Gary J. Aguirre: *The Enron Decision: Closing the Fraud-Free Zone on Errant Gatekeepers?* 28 Del. J.Corp. Law 447 (2003).

<sup>33</sup>See, e.g., Andrew S. Gold, *Reassessing the Scope of Conduct Prohibited by Section 10(b) and the Elements of Rule 10b-5: Reflections on Fraud and Secondary Actors*, 53 Cath.L.Rev. 667 (2004), Cecil C. Kuhne, III, *Expanding the Scope of Securities Fraud?: The Shifting Sands of Central Bank*, 52 Drake L. Rev. 25 (2003).

liable despite the strict limitations on such liability after *Central Bank*. At the end of the day, the test adopted in *Enron* lends weight to the movement of enhanced gatekeeper liability through its clear rejection of the bright line test. Evidence of the growing desire to enhance gatekeeper accountability also can be seen in legislative action, as is clearly demonstrated in SOX.

## SOX

There is no doubt that SOX is aimed at enhancing gatekeeper liability. Senator Sarbanes, a lead sponsor of the Act, stressed that "We have to make sure the gatekeepers are doing their job."<sup>34</sup> Many sections of SOX evidence Congressional intent to statutorily expand the obligations of gatekeepers, primarily by attempting to establish a proscriptive regulatory regime by mandating specific procedures to be followed. To get a sense of this regime, a general understanding of the structure of the Act is necessary. The following section briefly sets forth some of the more important provisions of SOX. This overview is by no means intended as a comprehensive review of the Act. After this short overview, those sections of SOX that address gatekeeper obligations are discussed in greater detail.

### Overview of Sarbanes-Oxley

Intended to contain "the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt,"<sup>35</sup> the "Public Company Accounting Reform and Investor Protection Act of 2002," (commonly referred to as the "Sarbanes-Oxley Act" or "SOX") sailed through Congress and was signed into law by President Bush on July 30, 2002. While commentators may disagree about the suitability of the changes envisioned by SOX and debate its likely effectiveness on fraud prevention, most concur that it changes fundamentally the structure of corporate governance, giving the federal government a much greater role in what was traditionally viewed as the provenance

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<sup>34</sup>Pamela Barnett, Finance: Sarbanes Says Punishing 'Bad Actors' Not Enough, National Journal CongressDaily, July 8, 2002, at <http://nationaljournal.com/cgi-bin/iffetch4?ENG+CONGRESS+7->

<sup>35</sup>See Signing Statement of George W. Bush, July 30, 2002, available at [www.whitehouse.gov/news/releases/2002](http://www.whitehouse.gov/news/releases/2002).

of the states, and agree that this change in structure was intended to strengthen federal oversight over gatekeepers.<sup>36</sup>

The heart of SOX is the creation of a new self-regulatory entity, the “Public Company Accounting Oversight Board.”<sup>37</sup> With the accounting scandals of WorldCom and Enron foremost in their minds, Congress established the PCAOB to help prevent a recurrence of those events. The PCAOB is charged with regulating the accounting industry, establishing auditing standards and imposing discipline on members of the auditing profession. The jurisdiction of the PCAOB over accounting firms is ensured by Section 102 of SOX that makes it unlawful for any person who is not registered with the Board “to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer.”<sup>38</sup> In essence, the PCAOB is intended to fill the role for the accounting industry that the National Association of Securities Dealers (the “NASD”) fill for the brokerage industry. This is a significant addition to the regulatory regime over this industry.

In addition to creating this new regulatory agency to ride herd on the accounting industry, SOX imposes several substantive requirements on public corporations, directly affecting governance issues. These include, among others, that public company audit committees be made up entirely of independent directors,<sup>39</sup> that the chief executive and chief financial officers of all public companies certify on an on-going basis the accuracy of their company’s financial statements,<sup>40</sup> and that corporations change their periodic

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<sup>36</sup>See, Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform* 29 Iowa J. Corp. L. 625 (2004); Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 St. John's L. Rev. 671, 672-74 (2002); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. Corp. L. 1, 57-59 (2002).

<sup>37</sup>SOX Section 101.

<sup>38</sup>SOX at 102.

<sup>39</sup>See Section 301. The Act defines “independent” as requiring that an audit committee member may not be an “affiliated person” of the corporation or any subsidiary and may receive no more than a director’s fee for services.

<sup>40</sup>See Section 302. In addition to certifying the accuracy of the reports the chief executive and chief financial officer must also certify as to the effectiveness (or lack thereof) with internal controls they agree to establish and maintain.

reporting to make more current and complete disclosure about their financial conditions.<sup>41</sup> Each of these provisions shows Congressional determination to have federal regulation play a more prominent role in corporate governance.

Other provisions of SOX do not impact corporate governance as directly, but aim to increase the deterrent effect of SOX and other securities laws. Examples of this type of provision include sections enhancing criminal penalties for violations of the securities laws,<sup>42</sup> extending protection to “whistleblowers,”<sup>43</sup> and extending the statute of limitations for securities fraud actions.<sup>44</sup>

The sections of SOX described so far effect significant changes to the structure of corporate governance and take meaningful steps to increase the likelihood that the requirements of the securities laws will be complied with. Another category of provisions of particular relevance for this Article are provisions that alter affirmatively the responsibilities placed on gatekeepers. Specifically, SOX addresses directly the responsibilities of public accounting firms and persons associated with them,<sup>45</sup> of attorneys who appear before the SEC “in any way in the representation of issuers,”<sup>46</sup> and of securities analysts who issue research reports.<sup>47</sup> In each case, SOX attempts to define more clearly the role that each gatekeeper is expected to play and provides for recourse against those who fail to perform their functions as mandated.

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<sup>41</sup>See Section 409. Under this section, corporations must disclose material changes in a “rapid and current basis.” Further, Section 401 requires companies to disclose “all material off-balance sheet transactions” that might have a “material current or future effect” on the financial health of the company. See Section 401(a).

<sup>42</sup>See Section 802.

<sup>43</sup>See Section 806. This section creates a new criminal statute—18 U.S.C. § 1514 A that protects whistleblowers from discharge, demotion and other penalizing actions.

<sup>44</sup>See Section 804. This section changes the current statute of limitations from a one year after discovery of the facts constituting the violation or three years after such violation occurred rule to a two year/five year rule.

<sup>45</sup>See Section 105.

<sup>46</sup>See Section 307. Under this section, the SEC is to institute rules requiring attorneys who represent public companies to report the described violations first to the company’s chief legal counsel or CEO. If that individual fails to take “appropriate action” the attorney must report the violation to the company’s audit committee, to its independent directors or its entire board of directors.

<sup>47</sup>See Section 501. This section sets forth specific requirements for rules intended to “improve the objectivity of research and provide investors with more useful and reliable information.”

## Public Accounting Firms and Associated Persons

As mentioned above, one of the key provisions of SOX is the creation of the PCAOB, a regulatory body with extensive authority over public accounting firms. Section 103 of the Act speaks directly to the power of the Board, calling for it to establish standards for auditing and attestation, including quality control and ethics, to be used by all registered public accounting firms (which effectively means any accounting firm working in the securities industry). The Act specifically requires the PCAOB to establish rules addressing certain procedural details of how accounting firms must conduct their auditing work. These rules are clearly aimed at increasing the obligations placed on gatekeepers as they perform their traditional functions, and are intended to raise the level of diligence required of such actors. The rules specify requirements regarding with records retention,<sup>48</sup> independent verification of auditing work,<sup>49</sup> and description and evaluation of the effectiveness of issuers' internal control structure and procedures.<sup>50</sup>

Another set of provisions deals with the internal governance of accounting firms, rather than the methods by which they must conduct their external audit functions. Rules addressing internal governance matters require that firms monitor of professional ethics,<sup>51</sup> have specific methods for the supervision, hiring, professional development and advancement of personnel, and control the acceptance and continuation of engagements, among others.<sup>52</sup> These rules, like those governing the method of conducting audits, increase the regulation of accounting entities and help to ensure that these gatekeepers are held responsible.

In addition to these specific rules governing external and internal procedures to be used by all registered public accounting firms, the PCAOB is charged with establishing general standards to be used by such firms in the preparation and issuance of audit reports as required by SOX and "as may be necessary or appropriate in the public interest or for the protection of investors."<sup>53</sup> The Board is granted the power to police firms for

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<sup>48</sup>See Section 103(2)(A)(i). (firms must prepare and maintain records for no less than seven years). This rule is a direct reaction to the problems caused by Arthur Anderson's shredding of documents.

<sup>49</sup>See Section 103(a)(2)(A)(ii).

<sup>50</sup>See Section 103(a)(2)(A)(iii).

<sup>51</sup>See Section 103(a)(2)(B)(i).

<sup>52</sup>See Section 103(a)(2)(B)(iii) and (iv).

<sup>53</sup>See Section 103(a)(1).

compliance with these rules and standards and to take disciplinary actions authorized by SOX and to report any violations it discovers to the SEC or appropriate State regulatory authorities.<sup>54</sup> This broad grant of authority assures that the PCAOB has the ability to respond to any situations that may arise that were not addressed adequately by the specific rules contained in SOX. It provides the flexibility necessary to ensure that the newly created regulatory agency can provide effective monitoring functions in the future.

Although the focus of SOX is the creation of the PCAOB and the charge to that agency to regulate public accounting firms, Congress took steps in SOX to enhance auditor independence without using the auspices of the PCAOB. Through amendments to the Securities Exchange Act of 1934, the law now prohibits public accounting firms from engaging in certain specified “prohibited activities.” After SOX, it is unlawful for any public accounting firm performing audit functions for a company to simultaneously engage in specified non-audit services.<sup>55</sup> Additionally, no firm may provide audit services to an issuer for more than five consecutive years.<sup>56</sup> Auditor/company independence is further ensured by a prohibition on any firm providing audit services to a company if an insider of that company was employed by the auditing firm and participated “in any capacity” in auditing the issuer during the 1-year period preceding date of the audit.<sup>57</sup> These provisions have sparked plenty of controversy<sup>58</sup>, but add weight to the argument that Congress intended in SOX to strengthen the role that accounting firms play as gatekeepers. By insisting on independence between auditors and issuers, Congress tried to increase the likelihood that auditors would be able to perform their gatekeeper function, free from some of the pressures (real or perceived) that prevented them from doing so in the cases of Enron, WorldCom and others.

### **Attorneys**

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<sup>54</sup>See Section 104(c)(2) and (3).

<sup>55</sup>See Section 201(a). Prohibited non-audit services include, among others, booking, financial information systems design, appraisal or valuation, fairness opinions and actuarial services.

<sup>56</sup>See Section 203.

<sup>57</sup>See Section 206.

<sup>58</sup>See, e.g., Mark J. Loewenstein, *The Quiet Transformation of Corporate Law*, 57 SMU L. Rev. 353 (2004); Matthew J. Barrett, *In the Wake of Corporate Reform: One Year in the Life of Sarbanes-Oxley—“Tax Services” As a Trojan Horse in the Auditor Independence Provisions of Sarbanes-Oxley*, 2004 Mich. St. L. Rev. 463.



As well as placing significant obligations and responsibilities on public accounting firms and associated persons, SOX speaks directly to the responsibilities attorneys have as gatekeepers. Section 307 of the Act calls for the SEC to establish rules “setting forth minimum standards of professional conduct” for attorneys appearing before the Commission. In essence, the rules mandated by SOX require attorneys to “report up” material violations of securities laws or breaches of fiduciary duty. “Reporting up” means that any attorney who discovers evidence of any such violation must first report the finding to the chief legal counsel or chief executive of the company in question and, if such individual “does not appropriately respond” to such violation, must report the evidence to the company’s audit committee or another wholly independent committee or to the board of directors as a whole.<sup>59</sup>

The rationale for the “reporting up requirement” was made very clear in blunt statements made by two of the principal drafters of Section 307 while SOX was under consideration. Referring to the recent rash of corporate scandals, Senator Michael Enzi (R-Wyo.) remarked: “One of the thoughts that occurred to me was that probably in almost every transaction there was a lawyer who drew up the documents involved in that procedure.”<sup>60</sup> In a similar vein, Senator Jon Corzine (D-N.J.), the former chief executive of Goldman Sachs, noted:

In fact, in our corporate world today - and I can verify this by my own experiences - executives and accountants work day to day with lawyers. They give them advice on almost each and every transaction. That means when executives and accountants have been engaged in wrongdoing, there have been some other folks at the scene of the crime - and generally they are lawyers.<sup>61</sup>

By requiring attorneys to report up, Congress hoped to heighten the gatekeeper function lawyers play. Recognizing that lawyers are intimately involved in virtually all corporate transactions, the new provision demands that they act more effectively as monitors. As with almost all of the provisions of SOX, the reporting up requirement generated significant controversy when it was proposed.<sup>62</sup> Similarly, as with almost all of

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<sup>59</sup>See Section 307.

<sup>60</sup>148 Cong. Rec. S6554 (daily ed. July 10, 2002) (statement of Sen. Enzi)

<sup>61</sup>Id. at S6556 (statement of Sen. Corzine).

<sup>62</sup>See, e.g., Peter J. Henning, *Sarbanes-Oxley Act 307 and Corporate Counsel: Who Better to Prevent Corporate Crime?*, 8 Buff. Crim. L. R. 323(2004); Darlene M. Robertson & Anthony A. Tortora, *Reporting Requirements for Lawyers Under Sarbanes-Oxley: Has Congress Really*

the provisions of SOX, regardless of one's position on its merits, the reporting up requirement, evidences clear Congressional intent to enhance gatekeeper obligation.

### **A Simple Proposal to Further Enhance Gatekeeper Obligation.**

The evidence is strong that legislators and courts want to enhance the role that gatekeepers play in maintaining the integrity of the US capital markets. *Enron* and other cases, together with enactment of SOX, show broad agreement that all participants must be held to account. Proscribing behaviors through legislation and enforcing standards under existing legal precedent can help to encourage appropriate gatekeeper behavior, but by themselves are insufficient to prevent further corporate fraud. Laws and precedent intended to deter bad actions were plentiful at the time that Enron and WorldCom imploded. While SOX strengthens the regulatory regime governing gatekeepers, it does not do enough.

What SOX fails to do, and what needs to be done to support the goal of meaningful fraud deterrence, is to explicitly re-instate aiding and abetting liability in private actions this simple act would strengthen current efforts to hold gatekeepers to high standards of conduct and responsibility. It would empower private parties to help monitor and police our capital markets for bad action. Allowing private parties to pursue aiding and abetting claims against gatekeepers would decrease the burden on the SEC and other regulatory agencies at a time when their resources are already stretched thin. Finally, a clear articulation of aiding and abetting liability would help clarify the law regarding gatekeeper liability by removing the need for courts to argue over whether the bright line, substantial participation or creation test for secondary actor liability should apply.

Several methods could be used to re-instate aiding and abetting liability. First, the Supreme Court could expressly over-rule *Central Bank*. This would send a clear message, but is unlikely to occur despite the disagreement in the circuits about how to interpret its holding, a disagreement evidenced by the lack of uniformity on what the appropriate standard should be to find an actor liable as a primary violator. As an alternative to Supreme Court action, lower courts could resolve the current disagreement about secondary actor liability by uniformly rejecting the bright line test and adopting an expansive interpretation of the substantial participation or creation test, as was done in

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*Changed Anything?*, 16 Geo. J. Legal Ethics 785 (2003); Panel Discussion: *The Evolving Legal and Ethical Role of the Corporate Attorney After the Sarbanes-Oxley Act of 2002: Panel 2,; The Evolution of Corporate Governance*, 52 Am. U.L. Rev. (2002).

*Enron*. While this approach might achieve the desired result of holding more gatekeepers to account, it too is unlikely in light of the strong position of some of the circuits.

Even if the lower courts proved willing to hold gatekeepers liable under § 10(b) and Rule 10 (b)5 by characterizing them as primary violators, doing so does nothing to further the goals of clarity and transparency in the law. As *Enron* shows, it is possible to tweak the language of *Central Bank* in such a way as to impose primary actor liability on gatekeepers, but doing so involves linguistic gymnastics that add little useful guidance to others. Language matters; if the end goal is the re-establishment of aiding and abetting liability, it would be better to simply do explicitly.

Therefore, aiding and abetting liability should be expressly re-established by Congress through the addition of a provision to SOX. The language of such a provision is already available—it could simply be taken directly from § 104 of the Private Securities Litigation Reform Act of 1995.<sup>63</sup> That provision authorizes the SEC to pursue injunctive actions for aiding and abetting violations of certain securities laws, and expressly governs the "liability of controlling persons *and persons who aid and abet violations*." Section 104 provides in relevant part:

*(f) Prosecution of persons who aid and abet violations* For purposes of any action brought by the Commission under paragraph (1) or (3) of Section 78u(d) of this title, *any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter*, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided. (emphasis added).

This language is identical to that frequently used by lower federal courts in articulating the elements of aiding and abetting under Section 10(b) before *Central Bank* eliminated private causes of action for aiding and abetting. The elements of § 104 clearly mirror the elements courts traditionally used to define aiding and abetting under Section 10(b). Because the language is the same used by courts prior to *Central Bank*, ample precedent exists that has already established standards of liability—there will be no need to start from scratch.

### **Is Re-Instating Aiding and Abetting Liability Worth it?**

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<sup>63</sup>Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

It is, of course, impossible to know with certainty whether re-instating aiding and abetting liability would make a significant contribution to deterring fraud in our capital markets. Increasing the risk of found liable for fraud should have a deterrent effect on those gatekeepers whose behavior we aim to regulate. One of the premises of our judicial system is that the threat of sanctions increases deterrence. Is aiding and abetting a sufficiently serious problem that Congress should act to re-vitalize it? Again, it is impossible to know for sure, but on this point, some hard data is available. In SOX, Congress directed the SEC to conduct a study and submit a report (the “Section 703 Report<sup>64</sup>”) examining the behavior of “securities professionals.”<sup>65</sup> The Section 703 Report detailed violations of the federal securities laws and classified offenders as either primary violators, aiders and abettors or both.<sup>66</sup> The Report covers the years from 1998-2001. During that time, the SEC found that 1,299 securities professionals had committed primary violations of the securities laws, while only 13 were found solely to have aided and abetted such violations. An additional 284 were found to be both primary violators and aiders and abettors.

These numbers may seem to suggest that aiding and abetting violations are not a significant problem and Congress need not act to re-instate liability for such violations since the vast majority of claims brought by the SEC were against primary violators. However, some perspective is called. First, the focus of the SEC during the time of reporting was on securities professionals who would be considered primary actors and as such, naturally held liable as principal violators. Data from the Section 703 Report shows that of the 1,735 total violations reported, 796 were committed by individuals associated with broker/dealers and 239 were committed by a broker/dealer firm. When looking at violations committed by entities or individuals considered to be secondary actors, the numbers drop precipitously—accounting firms had only 13 findings of violations, while attorneys had 49. These numbers may suggest that secondary actors commit fewer violations and therefore are not worth pursuing, although it is hard to argue that those involved with fraud should not be punished. In truth, these numbers tell us very little

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<sup>64</sup>Report of the Securities and Exchange Commission: Section 703 of the Sarbanes-Oxley Act of 2002, Study and Report on Violations by Securities Professionals.

<sup>65</sup>“Securities professionals” is defined as “public accountants, public accounting firms, investment bankers, investment advisors, brokers, dealers, attorneys, and other securities professionals practicing before the Commission.” Id. “Other securities professionals” is defined to include “individuals associated with an investment adviser or investment company; transfer agents; stock promoters; and chief or principal financial officers of public companies.” Id.

<sup>66</sup>The SEC was able to collect data on aiding and abetting because it retains the ability to bring such claims. *Central Bank* bars only private actions, not agency-instituted ones.

about the number of violations committed by secondary actors. The focus of the SEC investigations was on primary actors because that is where SOX demanded the agency place its attention. There is no way to determine what incidence of aiding and abetting liability would have been uncovered if that activity had been more rigorously pursued.

In truth, knowing the precise number of gatekeepers who engage in aiding and abetting, while interesting, is not that important. If just one such actor is deterred by re-instating the ability of private parties to bring actions, re-instatement is worth it. It would perhaps give some sense of purpose and security to the millions of defrauded investors who lost their life savings in the financial meltdown of the late 1990's and early 2000's. Our capital markets depend on investors having faith in the integrity of those involved. Empowering investors to help rid the markets of bad actors would help them re-gain the trust necessary to maintain a financially viable market.

In addition to giving a sense of empowerment to investors, re-instating a private right of action for aiding and abetting under § 10 (b) and Rule 10 (b)5 would allow investors to act as additional monitors over gatekeeper behavior. The resources of the SEC are finite—the agency simply cannot do it alone. In fact, some argue that recent trends at the SEC suggest that its policing function is likely to diminish in the future.<sup>67</sup> Whether or not such predictions turn out to be true, it can only benefit both the agency and the markets to have an additional body of monitors.

Those who oppose re-instituting the ability of private parties to bring aiding and abetting claims make several arguments against doing so. First, some argue that further regulation is not necessary because the frauds that were committed by corporations such as Enron and WorldCom were the result of “a classic bubble that overtook the equity markets in the late 1990s and produced a market euphoria in which gatekeepers became temporarily irrelevant.”<sup>68</sup> For “bubble” advocates, (who include Alan Greenspan<sup>69</sup>), no action is necessary to prevent gatekeeper bad behavior. Instead, automatic market

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<sup>67</sup>See, e.g., Robert Kuttner, *Californian Cox, the President's Choice to Reverse the Reforms at the SEC, could be Bush's Singly Most Destructive Regulatory Appointee*, The American Prospect, August 2005; *With Ease, 3 Nominees Win Seats on S.E.C.*, N.Y. Times, July 30, 2005, at C2 (each reporting concerns that the newly appointed Chairman may decrease regulatory focus).

<sup>68</sup>John C. Coffee, Jr. *Understanding Enron: "It's About the Gatekeepers, Stupid"*, 57 Bus. Law. 1403 (2004).

<sup>69</sup>See Chairman Alan Greenspan, Corporate Governance, Remarks at the Stern School of Business, New York University (Mar. 26, 2002), *available at* <http://www.federalreserve.gov/boarddocs/speeches>.

correction will occur as the “bubble” bursts and gatekeepers regain their sense and their power. Faced with increasingly skeptical investors, issuers will no longer be able to dictate the rules of the game, and gatekeepers will resume their traditional functions.

This somewhat utopian position is hard to support. First, to accept it, one must accept that the financial catastrophes of recent years were caused by an irrational bubble in the markets and not by systemic failure. Further, to accept the bubble position (i.e. that bad gatekeeper behavior will vanish together with the bursting of the bubble), one must also accept that gatekeepers and issuers will not repeat their bad behavior in a “non-bubble” market. That belief seems idealistic at best. As powerfully pointed out by Marlene O’Conner, the power of “groupthink” is strong in the corporate industry.<sup>70</sup> The incentives to commit fraud are especially strong in the corporate arena where there are vast sums of money at stake. It would be naive at best to suppose that those incentives will vanish. Human ingenuity is boundless—the particular types of fraud we witnessed in the last round of scandal may be over, but there are certainly other forms waiting to be devised. It is simply unrealistic to presume that fraudulent behavior will vanish.

Another argument raised against re-instating aiding and abetting liability is that doing so will flood the courts with securities fraud claims. On one level, this assertion can be quickly discounted by a blanket refusal to yield to any such “slippery slope” position. Additionally, this argument is quickly countered by the fact that all aiding and abetting claims would have to meet the heavy burdens set before them by the PSLRA<sup>71</sup> and other securities laws. Thus, aiding and abetting claims will have to satisfy all of the elements of § 10 (b) and Rule 10 (b)5 and will have to be pled with specificity, among other requirements. The likelihood that such claims would overwhelm the courts is minimal.

## Conclusion

Despite the controversy over what exactly “caused” the most recent corporate scandals, there is widespread agreement that gatekeepers—those actors best positioned to help prevent fraud failed miserably. Court decisions and legislation forthcoming after the

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<sup>70</sup>Marleen O’Connor, *The Enron Board, The Perils of Groupthink*, 71 U. Cin. L.Rev 1233 (2003). “Groupthink” refers to the phenomenon where the cohesive nature of a group causes it’s members to strive for unanimity and overrides their motivation to realistically appraise alternative courses of actions.

<sup>71</sup>For discussions of these burdens *see, e.g.*, Joel Seligman, *Rethinking Private Securities Litigation*, 73 U. Cin. L. Rev. 95 (2004); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987 (2003); Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 B.Y.U.L. Rev. 1239.

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meltdown at Enron, WorldCom and others demonstrate judicial and Congressional will to take strong action to prevent future recurrence of this tragedies. While admirable, these “fixes” do not go far enough.

It is time to break the *Bank*, to recognize explicitly what Congress and the courts have done implicitly. Re-instating aiding and abetting liability will strengthen our securities regulation regime at a time when such a result is clearly the will of all involved.